IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27757-7-III**
	)	**(consolidated with**
Respondent,	)	**No. 27758-5-III)**
	)	
v.	)	**Division Three**
	)	
DANIEL R. EPLEY,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — A trial court has broad discretion to deny a defendant's request for a nonjury trial. Here, the trial court denied Daniel Epley's request to waive a jury trial because Mr. Epley failed to adequately articulate a basis for his request. We conclude the trial court did not abuse its considerable discretion on this question. And we therefore affirm Mr. Epley's convictions.

FACTS

The State filed numerous charges against Mr. Epley. Before trial, Mr. Epley requested a nonjury trial. During the court's questioning of Mr. Epley on the matter, he

revealed that he had suffered a head injury as a child and been in special education. The court discussed the matter with Mr. Epley on the record:

> THE COURT: And why do you think it would be better to not have a jury? Why are you asking this?
>
> THE DEFENDANT: I don't know. I just don't know which way. You know, I never been to a jury trial and a couple people said they have and they said its worth – I don't know. I have never had a chance to actually talk to [defense counsel] about it this morning because they told me last night when I was locked in a cell and they were telling me about this, that I needed to drop the jury.
>
> THE COURT: Who is that –
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> THE DEFENDANT: A couple guys at Geiger.
>
> THE COURT: Inmates?
>
> THE DEFENDANT: Well, yeah. One was – one was, I think, I guess he was a guard. He was in uniform and he says it's easier on a bench trial than jury trial.
>
> THE COURT: Said it's easier. Okay. So an inmate at Geiger and a guard at Geiger told you it would be better for you to have bench trial?
>
> THE DEFENDANT: Or I was never – I am not sure what's easier.
>
> . . . .
>
> THE COURT: Can you put into your own words why you don't want to have a jury?
>
> THE DEFENDANT: No, I don't. It's just hard for me. I just never been in this position before. I was – I always listened to other people and try to make my own decision. . . . I mean, I just didn't know which would be easier, jury or bench.

Report of Proceedings (RP) at 113-14.

Defense counsel stated that she questioned Mr. Epley about his decision but the decision was ultimately his to make. The court concluded that Mr. Epley had been unable to adequately articulate a basis for wanting a bench trial and denied his request.

The case proceeded to trial. The jury found Mr. Epley guilty of unlawful imprisonment, two counts of second degree assault, harassment, first degree burglary, violation of a domestic violence no contact order, and stalking.

DISCUSSION

Waiver of a Jury Trial

Mr. Epley first contends the trial court should have granted his request for a bench trial because he was "willing to submit a written waiver of his right to a jury trial and the State voiced no objection to the motion." Appellant's Br. at 7. Relying on *City of Bellevue v. Acrey*[1] and *State v. Brand*,[2] he argues that a jury waiver is effective where, as here, a defendant is aware of his right to a jury, has discussed such a waiver with his attorney, and waives that right in writing.

We review a trial court's denial of a defendant's request for a bench trial for abuse of discretion. *State v. Thompson*, 88 Wn.2d 13, 15, 558 P.2d 202 (1977). The trial court's decision is reversible error only when the exercise of its discretion is untenable. *State v. Batten*, 17 Wn. App. 428, 439-40, 563 P.2d 1287 (1977). And there is no reversible error unless the defendant shows he was prejudiced by the denial. *State v. Maloney*, 78 Wn.2d 922, 928, 481 P.2d 1 (1971).

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[1] *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208, 691 P.2d 957 (1984).

[2] *State v. Brand*, 55 Wn. App. 780, 785, 780 P.2d 894 (1989).

"Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has the consent of the court." CrR 6.1(a); *see also* RCW 10.01.060 ("where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court").

Mr. Epley argues that he met the standards for an effective jury waiver and the trial court then abused its discretion by denying his request for a bench trial. He also contends the court erred in concluding that a colloquy on the record was required for an effective waiver.

The cases cited and relied on by Mr. Epley simply articulate the minimum requirements to establish a valid waiver. *Acrey*, 103 Wn.2d 203; *Brand*, 55 Wn. App. 780. They do not support, as he suggests, the broader proposition that if certain minimum requirements are met, the trial court must grant a defendant's request for a nonjury trial. For example, the *Acrey* court simply held that a waiver of a jury must be expressly made by the defendant on the record. *Acrey*, 103 Wn.2d at 207-08. The *Brand* court held that a written waiver is sufficient and an extensive colloquy with a defendant is not required. *Brand*, 55 Wn. App. at 785.

Mr. Epley's arguments also suggest that he has a right to waive a jury trial. He does not. *State v. Oakley*, 117 Wn. App. 730, 736, 72 P.3d 1114 (2003); *Singer v. United*

States, 380 U.S. 24, 35-36, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965). "[A] defendant's right to trial by jury does not give the defendant the opposite right to demand a bench trial." *Oakley*, 117 Wn. App. at 736. Thus, the State may force a defendant to a jury trial despite his request. *Id.* at 737; *see also Thompson*, 88 Wn.2d at 15 (no constitutional rights implicated in denial of defendant's request for waiver of jury trial).

Here, the trial judge had a thoughtful and extensive exchange with Mr. Epley on the record about his thoughts and concerns and the reasons for them. Mr. Epley could not explain why he wanted a bench trial when pressed by the court. He could not explain how a bench trial would be the better option or point to any evidence that the jury could not be fair and impartial: "I just didn't know which would be easier, jury or bench." RP at 114. This record provides a tenable basis for the trial judge's decision. The trial judge did not abuse her discretion.

Special Verdict Instruction

Next, Mr. Epley assigns error to instruction 48. He contends that the court erred in instructing the jury that it had to be unanimous to answer "no" to a special verdict question. Mr. Epley relies on *State v. Goldberg*.[3] It held that jury unanimity is not required to answer "no" to a special verdict. *Goldberg*, 149 Wn.2d at 894.

"It is well-settled law that before error can be claimed on the basis of a jury

[3] *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003).

instruction given by the trial court, an appellant must first show that an exception was taken to that instruction in the trial court." *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990); *see also State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) ("Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording."). Mr. Epley agreed to this instruction. RP at 981. But he is wrong, in any event.

Instruction 48 does not require jury unanimity to answer "no." It states in pertinent part:

> In order to answer any question on the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

RP at 981; Clerk's Papers (CP) at 114.

This language is identical to the instruction approved of in *Goldberg*. *See Goldberg*, 149 Wn.2d at 893. The issue in *Goldberg* was whether the trial judge upon discovering the jurors had not unanimously answered "no" to a special verdict question, erred in ordering them to resume deliberations until they reached unanimity. *Id.* The jurors there had been correctly instructed that they were not required to unanimously answer "no" to the special verdict question. And, accordingly, the trial court erred by

ordering the jurors to continue deliberations. *Id*. at 894. Instruction 48 is a correct statement of the law and nothing in *Goldberg* suggests that it is not.

We affirm Mr. Epley's convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.